

which is located in 901:10-2-14 Appendix E, when they state "risk assessment method" in their interrogatory: In extreme cases certain acreage may exceed the basic phosphorus concentration limit of 150 ppm but the index, which is based on a number of factors, may allow for application of phosphorus.

18.) Explain why the ODA does not base the phosphorus applications in the nutrient management plan in this permit on agronomic rates as required by the Clean Water Act regulations.

**RESPONSE:**

The Director specifically objects to this interrogatory as vague, not relevant and not likely to lead to evidence relevant to the subject matter involved in the pending action because the permit was issued pursuant to R.C. 903.02 and 903.03, which provisions of state law and their related rules are not required to track the Clean Water Act.

19.) Describe why the phosphorus per lactating cow in this permit is less than the standards in OSU Extension Bulletin 604.

**RESPONSE:**

The more generalized information in OSU Extension Bulletin 604 is used in cases where actual or similar data is not available. The average data from similar facilities was and was used available for the (b)(6) Dairy.

20.) Produce documents for processes, including calculations, used to check the summary of land available for manure that is generated by the Dairy for the duration of the permit.

**RESPONSE:**

Relevant, non-privileged documents have been produced, are in the certified record and will be made available for inspection and copying upon request.

21.) Produce all documents and calculations used in determining the number of spreadable acres, including set backs, for all fields receiving manure in this permit.

**RESPONSE:**

Relevant, non-privileged documents have been previously produced, are in the Certified Record and will be made available for inspection and copying upon request.

22.) Produce all agreements and contracts with landowners which prove that the fields in this permit are available for the duration of the permit.

**RESPONSE:**

There are no responsive documents because no written agreements or contracts were provided, however, entities identified by the Applicant that have agreed to make fields available for manure application were contacted by and agreement was confirmed by Gary Zwolinski.

**21. Operator Experience**

*"The listed owners have never run such a large operation and have no record of being qualified to do so. Most of your regulations seem to be 'self-reporting' and I have no faith in them being capable or even willing to do an exemplary job of this."*

*"Additionally, the State, the ODA requires the permit holder to have some (inaudible) experience. How does their prior experience with (b)(6) cows equate to (b)(6) cows? The number may be wrong. This is not comparable."*

**Response:**

The members of (b)(6) Dairy, LLC—the operators—must be familiar with ODA rules applicable to their operation including sanitation rules administered by the ODA Dairy Division and the rules administered by the Livestock Environmental Permitting Program. LEPP rules require recordkeeping of daily and weekly inspections in the Operating Record with frequent reference to rules and permit requirements, and the permits are written in such a way that each permit requirement refers to the rule to be followed. ODA does not have legal authority to impose a specific level of experience (such as a number of years of experience) upon a potential operator, but the members of (b)(6) Dairy, LLC are required and will be expected to fully comply with the law and their permits to the same level as any other experienced operator.

**22. Permit Renewal**

*"This operating permit is good for 5 years, what if they are not operating as the permit states at the end of 5 years, does the ODA have the right to not give a continuing operation permit?"*

*"How often after the first 5 years do they need to reapply for an operating permit?"*

**Response:**

The Director may deny, modify, suspend or revoke operating permits provided that such action is supported by facts and law. See RC 903.09(F). This includes applications for renewal permits.

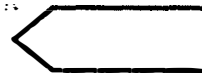
They must apply for renewal of their Permit to Operate every 5 years and if they ever want to expand they must apply for a new Permit to Install and Permit to Operate for the expansion.

**23. NPDES Regulations Listed in Permit**

*"Explain why the (b)(6) Permit lists NPDES regulations throughout this Permit but the LEPP regulations do not comply with NPDES regulations."*

**Response:**

It is not clear which parts of the LEPP regulations the commenter believes do not comply with NPDES regulations. At present, ODA seeks but has not been awarded authority to implement the NPDES program in Ohio in place of Ohio EPA. Nevertheless, in developing a regulatory program to satisfy federal NPDES requirements, ODA rules are written so that a facility that has a permit as a concentrated animal feeding facility under Ohio law will also be able to satisfy NPDES requirements for a concentrated animal feeding operation under federal law.



**Larry Vickie Askins**

---

**From:** Hopper, Bill [BHopper@agri.ohio.gov]  
**Sent:** Wednesday, June 29, 2011 3:01 PM  
**To:** (b)(6)  
**Cc:** Tonn, Kristina  
**Subject:** Request for Department's Responses to Rules Comments

**Categories:** Purple Category, Blue Category

June 29, 2011

Re: Public Records Request of June 28, 2011

Ms. Askins,

The Department of Agriculture has received your request (appended below) for the Department's responses to comments submitted by you on June 16, 2011 regarding the LEPP rule amendments. The only comments received, either in person at the public hearing on June 16, 2011, or by written communication, were those submitted by you. All comments in writing and transcripts of any oral comments received at R.C. 119 public hearings are sent to the JCARR staff for inclusion in the materials provided to committee members.

The public hearing was part of the R.C. 119 process, which has no requirement that the agency conducting the hearing respond to comments submitted through the R.C. 119 process. The Department does not intend to submit any written responses to your comments to JCARR. Thank you for your comments to the proposed rules and for your inquiry. <

Bill Hopper  
Chief Counsel  
728 - 5712

---

**From:** Larry & Vickie Askins (b)(6)  
**Sent:** Tuesday, June 28, 2011 11:46 AM  
**To:** Legal  
**Cc:** Perge, Marsha; Harvey, Kelly  
**Subject:** RE: Public Comment Submissions

ODA Legal Department,

Would someone please respond to my request below? If your responses have already been submitted to JCARR, would you please consider this a request under Ohio's Public Records Act for copies of all the documents submitted to JCARR regarding the most recent batch of OAC revisions?

Thanks,



State of Ohio Environmental Protection Agency

## STREET ADDRESS:

Lazarus Government Center  
122 S. Front Street  
Columbus, Ohio 43215

TEL: (614) 644-3020 FAX: (614) 644-3184  
[www.epa.state.oh.us](http://www.epa.state.oh.us)

## MAILING ADDRESS:

P.O. Box 1049  
Columbus, OH 43216-1049

June 21, 2005

**CERTIFIED MAIL**

Dear Applicant:

Re: Pending Ohio EPA Concentrated Animal Feeding Operation (CAFO)  
National Pollutant Discharge Elimination System (NPDES) Permit Application

U.S. EPA published updated regulations for CAFOs in February of 2003. The regulations went into effect in April 2003. As with many federal regulations, these were appealed by organizations representing the industry as well as organizations representing environmental groups. The appeals were consolidated and heard by the Second Circuit Federal Court of Appeals. The Appeals Court's decision on the case was released in February 2005. The environmental parties involved in the appeals case requested a rehearing on appeal the court's decision. This request for rehearing has been denied. Therefore, the court decision stands and the regulations regarding CAFOs have once again been modified.

In response, Ohio EPA must modify its CAFO NPDES permit program in accordance with the results of the appeals case. You are being contacted because you currently have a pending NPDES permit application for your livestock facility. This application is now, however, considered incomplete due to the court's ruling that CAFOs must submit a manure management plan to the NPDES permitting authority for review and approval as part of the NPDES permit process. The court also ruled that the NPDES permitting authority must provide for public participation in the manure management plan review process. As such, Ohio EPA is requesting that you submit a manure management plan to Ohio EPA for review that will be available for public review during the draft permit step in the permit process.

Since your facility is a new source, you are required to have a manure management plan that meets all requirements of the NPDES permit upon permit finalization. In order to facilitate the plan submittal and review process, Ohio EPA has created the attached forms that can be used to update an existing plan to meet the minimum NPDES permit requirements. For example, if your facility has received permit to operate from the Ohio Department of Agriculture (ODA) or developed a Comprehensive Nutrient Management Plan (CNMP) through the United States Department of Agriculture-Natural Resources Conservation Service (USDA-NRCS), the forms can be inserted into the existing plans and the

Bob Taft, Governor  
Bruce Johnson, Lieutenant Governor  
Joseph P. Koncinski, Director

June 21, 2005

Page 2

plan then submitted to Ohio EPA. Please read the forms thoroughly however since Ohio EPA has several requirements that may differ from those in existing plans that you will be required to follow.

Ohio EPA would like to minimize the setback this appeals court ruling has made on the implementation of the NPDES permit process, therefore we are requesting that you submit the manure management plans within 30 days of the receipt of this letter. Please submit the plans to: Melinda Harris, Ohio EPA, Division of Surface Water, P.O. Box 1049, Columbus, Ohio 43216-1049.

For those of you with ODA approved plans, it should be noted that ODA is aware of this letter and the changes Ohio EPA is requesting that you make to your existing plans. The ODA review and approval process of the plans for the state program cannot be counted for the requirements of the federal program because ODA is not the authorized NPDES permitting authority, and because the plans developed according to ODA's rules effective July 2, 2002 do not meet the minimum requirements of the NPDES regulations.

Should you have any questions, comments, and/or concerns, please feel free to contact Cathy Alexander at (614) 644-2021 or via email at cathy.alexander@epa.state.oh.us or me at (614) 728-1357 or via email at mharris@epa.state.oh.us.

Sincerely,

*Melinda M. Harris*

Melinda M. Harris

PTI, Compliance Assistance & CAFO Unit  
Division of Surface Water

Attachments

**Testimony of Chris Korleski**  
**Director, Ohio EPA**  
**before the**  
***House Agriculture and Natural Resources Committee***  
**November 18, 2009**

Mr. Chairman, Representative Wagner, and members of this committee, I am Chris Korleski, Director of the Ohio Environmental Protection Agency. Thank you for the opportunity to testify before you in support of House Bill 363.

House Bill 363 will finalize the transfer of oversight of Concentrated Animal Feeding Operations/Facilities (CAFO/CAFF) to the Ohio Department of Agriculture (ODA), a process which was first initiated by the Ohio General Assembly in 2000. Specifically, it will transfer the permitting authority for the National Pollutant Discharge Elimination System (NPDES) for CAFOs from Ohio EPA to ODA.

Last fall, U.S. EPA gave conditional approval to ODA for the NPDES transfer. The transfer was conditionally approved by U.S. EPA pending certain legislative and rule changes. It was our hope that these statutory changes would be accomplished before the end of last year. However, the needed legislation (SB 383) was not completed, and I fear that a similar fate may befall us this year, too. Indeed, we are running out of time.

The state is under a very tight deadline to pass this legislation due to new federal CAFO rules promulgated by U.S. EPA. These new federal rules require states to make similar rule changes by December 2009. U.S. EPA has indicated that, because Ohio EPA currently retains the statutory authority to oversee the NPDES program for CAFOs, they expect Ohio EPA to implement the required rule changes. They also noted that they will not have a satisfactory basis to approve the transfer to ODA after December 2009. In my view, if the CAFO regulations are not incorporated into ODA's program, and if Ohio does not complete all the necessary steps to allow, once and for all, the full and final transfer of the NPDES program for CAFOs to ODA, then the regulatory confusion over this program will continue. As it stands now, Ohio EPA and ODA are sharing the regulatory responsibilities for CAFOs. This is not ideal. If this legislation is not passed quickly, Ohio EPA will be responsible for administering the NPDES program for CAFOs, while ODA will be responsible for administering the CAFO operating permit program.

Such an approach is confusing to everyone, including CAFO operators and those parties potentially impacted by CAFOs. Further, if left with the regulatory responsibility for the CAFO NPDES program, Ohio EPA will need additional resources to continue to implement the federally required program rules. Ohio EPA will also need to devote staff resources to aggressively ensure compliance with all permit requirements, as well as monitoring and inspecting permitted facilities. Failure to transfer the NPDES authority does not mean it will lie fallow at Ohio EPA. We will continue to implement a robust program as required by US EPA.

This legislation as previously introduced received bipartisan support in both chambers. It is also supported by the Ohio Farm Bureau. I ask that you support this legislation as drafted to ensure clarity on regulatory oversight for CAFOs.

Thank you again for the opportunity to testify on this important piece of legislation. I am happy to answer any questions you may have for me.

**Larry Vickie Askins**

---

**From:** Bernstein, Jon [jon.bernstein@epa.state.oh.us]  
**Sent:** Tuesday, August 09, 2011 7:44 AM  
**To:** Larry & Vickie Askins (b)(6)  
**Cc:** Alexander, Cathy  
**Subject:** RE: Follow-up from yesterday's call

**Categories:** Red Category

Hi Vickie,

The MMP accepted for (b)(6) Dairy's CAFO NPDES permit application was the same as included in ODA's permit. However, we included a Schedule of Compliance for them to develop an updated MMP. The permit can be found here:

[http://epa.ohio.gov/portals/35/cafo/2IK00023\\_BD.pdf](http://epa.ohio.gov/portals/35/cafo/2IK00023_BD.pdf)

Jon Bernstein, E.I.  
 PTI, Compliance Assistance, & CAFO Unit  
 Division of Surface Water  
 Ohio Environmental Protection Agency  
 P.O. Box 1049  
 Columbus, OH 43216-1049  
 (614) 728-2397

**From:** Alexander, Cathy  
**Sent:** Friday, August 05, 2011 7:38 AM  
**To:** Bernstein, Jon  
**Subject:** FW: Follow-up from yesterday's call

When you get a chance, can you check on the (b)(6) question? Pretty sure answer is "yes, but..."  
 Cathy

**From:** Larry & Vickie Askins (b)(6)  
**Sent:** Thursday, August 04, 2011 4:28 PM  
**To:** Alexander, Cathy  
**Subject:** Follow-up from yesterday's call

Hi Cathy,

- 1) I've copied below the LEPP rule I mentioned yesterday on the phone. Perhaps I misunderstood the "application to issue or modify a permit" to mean a PTI or a PTO permit. I remember in the past the ODA sent Melinda Harris a copy of their draft permits because that's when she noticed some of the (b)(6) Dairy manure fields were in the Village of Cygnet's WSPA.

## **901:10-6-03 Coordination of federal water pollution control act permit program with agencies of the United States.**

- (A) Upon the director's issuance of a draft permit for an **application to issue or modify a permit**, the department shall transmit by certified mail a copy of the permit application and the draft NPDES permit to the regional administrator of the United States environmental protection agency, unless by written



## FACT SHEET

**Summary of Changes.** New Rules in Chapters 901:10-1 to 901:10-6 of the Ohio Administrative Code.

This fact sheet is not intended as a substitute for a careful review of the rules but only provides a summary of the major changes in rules for Chapters 901:10-1 to 901:10-6 of the Ohio Administrative Code.

### Chapter 1-General Requirements

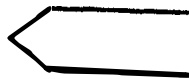
1. Definition of Owner and Operator-To clarify the meaning of owner and who has a right to control management of a facility or operation for purposes of background checks.
2. Complete permit applications are required-USEPA-To clarify that permit review starts when an application is complete and the application is “certified as true and accurate and complete.”
3. Background Checks-To add owners and operators of permitted facilities to this rule to enable the Director to commence enforcement or deny or revoke permits for owners or operators with a substantial history of noncompliance or who commit fraud and misrepresentation. Used the new definitions of owners and operators.
4. Certified Livestock Managers-To clarify that persons who transport and apply manure at annual quantities of 4,500 dry tons or 25 million gallons must be certified and must maintain records of acres used, field observations, tile stops/outlets, application date and rate, manure/nutrient quantities, soil conditions, and weather.
5. Permit Modifications-Added a new concept of “major operational changes” to the rule. “Major operational changes” require a written proposal from the producer and

written approval from ODA. “Major operational changes” are changes to Insect and Rodent Control Plans and changes in storage or capacity typically reviewed by engineering staff.

6. Exclusions-USEPA-To clarify that agricultural stormwater discharges (and other types of discharges) are excluded from NPDES permit coverage.

## Chapter 2-Technical Requirements for Permits to Install (PTI) and for NPDES Permits and Permits to Operate

1. Purpose and Applicability-In an NPDES program ODA has jurisdiction over small and medium CAFOs.
  - Requires PTIs for small and medium CAFOs that are subject that the Director determines are subject to 903.082 of the Ohio Revised Code.
  - Establishes siting criteria for small and medium CAFOs, based on NRCS standards.
2. Siting Criteria-
  - Changes based on recommendations from Ohio EPA to correspond to developments in source water protection of public water systems.
  - Changes recommended for consistency among all State departments for siting criteria to protect groundwater. ODA is the first department to make these changes in rules.
  - Improved and clarified chart on alternative technologies to reduce siting criteria.
3. Manure Storage and Treatment Facilities-Technical corrections to add NPDES requirements for design and installation as needed to meet operational requirements listed in Chapter 3 for NPDES permits and to meet NPDES industrial stormwater requirements.
4. Inspection, Maintenance, and Monitoring-USEPA requirements are added.



**903.082 Determination of size of concentrated animal feeding facility by director.**

(A) The director of agriculture may determine that an animal feeding facility that is not a concentrated animal feeding facility nevertheless shall be required to apply for and receive a permit to operate when all of the following apply:

(1) The director has received from the chief of the division of soil and water resources in the department of natural resources a copy of an order issued under section 1511.02 of the Revised Code that specifies that the animal feeding facility has caused agricultural pollution by failure to comply with standards established under that section and that the animal feeding facility therefore should be required to be permitted as a concentrated animal feeding facility.

(2) The director or the director's authorized representative has inspected the animal feeding facility.

(3) The director or the director's authorized representative finds that the facility is not being operated in a manner that protects the waters of the state.

(B) In a situation in which best management practices cannot be implemented without modifying the existing animal feeding facility, the owner or operator of the facility shall apply for a permit to install for the facility.

(C) In the case of an animal feeding facility for which a permit to operate is required under this section, a permit to operate shall not be required after the end of the five-year term of the permit if the problems that caused the facility to be required to obtain the permit have been corrected to the director's satisfaction.

Amended by 128th General Assembly File No. 12, HB 363, § 1, eff. 12/22/2009.

Amended by 128th General Assembly File No. 9, HB 1, § 101.01, eff. 7/17/2009.

Effective Date: 11-05-2003

the facility that is used to provide water for the animals. However, this site will have an additional network of wells, consisting of a minimum of four down-gradient and one up-gradient, that will be sampled twice annually for nitrate, total phosphorus, E. Coli and field pH, field specific conductivity and field temperature. After the wells have been installed, water samples will be taken and recorded prior to ODA granting authority to the facility to use the manure storage structures. 1D-

Several other permitted facilities have been approved, or are in operation, that have a groundwater monitoring system because the manure storage or treatment facilities were constructed within 15 feet of a potential aquifer, thus requiring that additional criteria be added to the design. To date, all groundwater monitoring that has been completed at these sites has not detected pollutants at increased levels.

ODA's rules were developed, reviewed and recommended by a diverse group of scientific professionals, including representatives of the ODNR Division of Soil and Water Conservation, Division of Water, and Division of Geological Survey; United States Geological Survey (USGS); USDA Natural Resources Conservation Service and Agricultural Research Service; and the Ohio EPA Division of Surface Water and Division of Drinking and Ground Waters. The rules were challenged but upheld in *Citizens Against Megafarm Dairy Development, Inc. et al. v. Dailey*, 2007-Ohio-2649, Franklin County Court of Appeals, 10th District, May 31, 2007.

As discussed in 1b below, New (b)(6) Dairy's manure storage and treatment facilities are not located in a karst area.

#### **b. Karst Geology**

Many comments were received concerning the location of karst geology.

*"The karst features and sinkholes dramatically increase the risk of ground water contamination from the (b)(6) dairy cows that are estimated to create waste at the same rate as 50,600 people."*

*"The ODNR recommends that animal feedlots, manure pits and other sources of bacterial contamination not be located in karst areas near sinkholes."*

*"A review of the first round comments dated 9-20-06 in the portion noted as 'Geological Exploration' the ODA notes that the dairy is in or near a karst area and the karst features are close enough to put the dairy in a position to institute additional safety features. What additional safety features were required to be implemented because of the proposed dairy being in a karst area? How do these additional safety features differ from typical safety features? Will these additional safety features protect ground water from contamination? Assuming the answer is yes, how and why, did you come to this conclusion? Have such safety features ever been implemented before in a karst area? What factual data can you provide that the safety features are adequate to protect ground water?"*

*"The proposed location for the New (b)(6) Dairy is in a karst area less than 1/2 miles from the Village of Woodville. The ODA acknowledges that this is a karst area in its 1st Round Comments dated 9/20/06 wherein it states '... the EPA karst map shows that the*